

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALEX CRUZ,

Defendant.

Case No. 1:97-CR-43-02

HON. RICHARD ALAN ENSLEN

ORDER

_____ /

This matter is before the Court on Defendant's Motions pursuant to 28 U.S.C. § 2253 and to proceed *in forma pauperis* on appeal. Defendant seeks to appeal this Court's Order of June 3, 2005. Said Order denied Defendant's Motion pursuant to Federal Rule of Civil Procedure 60(b)(6) which requested relief from this Court's Order denying Defendant's Motion for Federal Jurisdiction. (*See* Order, Dkt. No. 286; Def.'s Mot., Dkt. No. 284 at 2, n.1; *see also* Dkt. Nos. 246 & 250.)

Defendant has previously appealed this Court's Order denying Defendant's Motion for Federal Jurisdiction to the Sixth Circuit Court of Appeals. Defendant was denied a certificate of appealability by the Sixth Circuit and his appeal was dismissed. (*See* Dkt Nos. 260 & 274.) Defendant then petitioned the Supreme Court of the United States for a writ of *certiorari* regarding this issue. Defendant's petition was denied, as well as his request for rehearing. (*See* Dkt Nos. 282 & 283.)

For the reasons set forth in this Court's Order denying Defendant's Rule 60(b) motion and because Defendant has previously been denied a certificate of appealability as to the issues raised in his Rule 60(b) Motion, the Court determines Defendant has presented no colorable basis for appeal and a certificate of appealability will be denied.

Additionally, since Defendant did not proceed pursuant to 28 U.S.C. § 2255 in the underlying motion for determination of federal jurisdiction, 28 U.S.C. § 2253 does not apply. However, even if § 2253 did apply to Defendant's Motion, a certificate of appealability would not issue. Upon review of the issues individually as required by the decisions in *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001), the Court finds that reasonable jurists would not find Defendant's positions debatable with respect to the substantive grounds for denying relief as to all issues asserted. *See Slack*, 529 U.S. at 482-85; *see also Porterfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001).

Upon review of Defendant's Motion to Proceed *in forma pauperis* and supporting financial document, the Court determines that Defendant is indigent and without present funds to pay court fees.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for a Certificate of Appealability (Dkt. No. 288) is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Application to Proceed *In Forma Pauperis* (Dkt. No. 289) is **GRANTED**.

DATED in Kalamazoo, MI:
August 11, 2005

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE